No. 84-1070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ON BEHALF OF ITSELF AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the provision of aid by a state agency directly to a pervasively sectarian institution for the sectarian purpose of subsidizing a student's training as a pastor, missionary or church youth director violates the first amendment's establishment clause.

2. Whether a student has a free exercise right to have the state pay for his ministerial training when there is no burden on his right to practice his religion.

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This brief is submitted with the consent of the parties.

Originals of the letters reflecting such consent are being filed with the Clerk of the Court simultaneously with the filing of this brief.

INTEREST OF THE AMICI CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed *amicus* briefs in such cases as *Grand Rapids* v. *Ball*, 53 U.S.L.W. 5006 (U.S. July 1, 1985); *Aguilar* v. *Felton*, 53 U.S.L.W. 5013 (U.S. July 1, 1985); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and *Abington* v. *Schempp*, 374 U.S. 203 (1963). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support for religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty is a non-profit, nationwide educational organization with members representing the entire religious spectrum. Americans for Religious Liberty is dedicated to defending religious liberty for all persons, and maintains that the defense of religious liberty requires as strict as possible adherence to the constitutional principle of separation of church and state.

STATEMENT OF THE CASE

The petitioner in this case, Larry Witters, is a 28-year-old student with a degenerative eye disease who requested a government educational subsidy from the State of Washington Department of Services for the Blind. The requested subsidy was in connection with his application to the Inland Empire School of the Bible, a pervasively sectarian institution which trains its students to be pastors, missionaries and church youth directors.

The Department of Services for the Blind (formerly the "Commission for the Blind") is empowered to prepare, adopt and certify state plans, rules and regulations for the blind and visually handicapped. It is specifically authorized to "provide for special education and/or training in the professions, businesses or trades," Wash. Rev. Code Ann. § 74.16.181 (1982), and it does so by funding the education and training of qualified applicants. According to the Office of the Attorney General of the State of

Washington, the Department's policy "has always been to pay the school or training facility directly . . . to make sure that the individual does not take the money and spend it on something else." *See* Letter of David R. Minikel, Assistant Attorney General, attached as an Appendix. Mr. Minikel's letter emphasizes that "Washington State's practice is to provide the money directly to the institution involved and not to the individual." *Id.*

The Commission for the Blind rejected Witters' request for a subsidy in March 1980, concluding that the Constitution of the State of Washington forbids the use of public funds to assist an individual in ministry career training. Article 1, Section 11 of the Washington Constitution provides that "no public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment." In October 1980, following an administrative hearing, the Commission's decision was upheld by the Washington Department of Social and Health Services. Witters then appealed to the Superior Court in Spokane, and in an unreported opinion, Judge Marcus M. Kelly affirmed the Commission's decision in May 1982, again relying on the Washington Constitution. The case was then appealed to the Washington Supreme Court.

In its 7-2 decision issued last October, the Washington Supreme Court affirmed Judge Kelly's denial of the government funds to Witters. The Washington Supreme Court majority evaluated the program's constitutionality under the first amendment to the United States Constitution, and concluded that the primary effect of the aid in question would be to advance religion. The Washington Court therefore indicated that it did not have to consider the stricter provisions of the state constitution, and prohibited the transfer of state funds to the Inland Empire School of the Bible on Larry Witters' behalf. According to the Washington Supreme Court, "it is not the role of the state to pay for the religious education of future ministers." *Witters* v. *State of Washington*, 102 Wash.2d 624, ___, 689 P.2d 53, 56 (Wash. 1984).

SUMMARY OF ARGUMENT

This case raises the question of whether a state can provide financial assistance directly to a sectarian institution for the purpose of educating a future pastor, missionary or church youth director. Such direct aid to a sectarian institution for a sectarian purpose has never previously been allowed by this Court, because the establishment clause of the first amendment to the United States Constitution forbids it.

This Court recently emphasized that "although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the belief of a particular religious faith." *Grand Rapids* v. *Ball*, 53 U.S.L.W. 5006, 5009 (U.S. July 1, 1985). *Amici* submit when this principle is applied to the instant case, it mandates a finding that the State of Washington correctly refrained from subsidizing Larry Witters' religious education.

The first amendment's establishment clause "primarily proscribes 'sponsorship, financial support and active involvement of the sovereign in religious activity.'" *Grand Rapids*, 53 U.S.L.W. at 5008, *citing Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 773 (1973). In determining whether a statute violates the establishment clause, the Court has traditionally considered its purpose, its effect, and whether it fosters an excessive government entanglement with religion. *Grand Rapids*, 53 U.S.L.W. at 5008, *citing Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). Although the program at issue in this case might have a secular purpose and not foster excessive entanglement,[1] state aid directed to the Inland Empire School of the Bible on Larry Witters' behalf would have the unconstitutional primary effect of advancing religion. Unlike other cases in which this

1. If petitioner were to contend that the aid was serving a non-secular educational function of the sectarian institution, there would be an entanglement issue, because extensive government monitoring would be necessary to ensure the aid's correct use. *See, e.g., Aguilar* v. *Felton*, 53 U.S.L.W. 5013 (U.S. July 1, 1985). There is no entanglement issue here only because petitioner in effect concedes that the aid serves a sectarian educational function. *See infra* section IB.

Court has permitted some form of aid to religious institutions for their secular activities, this case involves aid to an institution which is pervasively sectarian for sectarian purposes. Consequently, it crosses the line of permissible assistance established by this Court.

Amici submit that state aid to the Inland Empire School of the Bible on Larry Witters' behalf should also be denied because it would pose an unconstitutional endorsement of Witters' religion. Anyone who becomes a pastor, missionary or church youth director at government expense conveys the message that the government has endorsed or preferred his religion. The establishment clause was intended to prevent just such endorsements. *See generally Wallace* v. *Jaffree*, 53 U.S.L.W. 4665, 4674 (U.S. June 4, 1985) (O'Connor, J., concurring).

In stating his case, petitioner has raised a free exercise claim, but his argument is not persuasive. The State of Washington's refusal to subsidize Larry Witters' education has not compelled or coerced him to violate his religious beliefs, and he is not being denied the opportunity to pursue his career goal. No American, Larry Witters included, has a free exercise right to government-funded training for the ministry. *See generally id.* at 4677.

Larry Witters' campaign for government-subsidized religious training has failed at every level, from the Washington Department of Services for the Blind through the Washington Supreme Court. It has failed because he is not entitled to the aid he seeks under either state or federal law. *Amici* therefore urge this Court to affirm the decision of the Washington Supreme Court, a decision mandated by the first amendment.

ARGUMENT

I.

THE WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND CORRECTLY REFUSED TO FORWARD FUNDS TO THE INLAND EMPIRE SCHOOL OF THE BIBLE TO SUBSIDIZE LARRY WITTERS' RELIGIOUS TRAINING BECAUSE SUCH AID IS PROHIBITED BY THE ESTABLISHMENT CLAUSE

A. The First Amendment Requires States to Treat Sectarian Institutions Differently from All Others.

The first amendment to the United States Constitution recognizes "the place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind." *Wallace* v. *Jaffree*, 53 U.S.L.W. at 4669 n.37, *citing* *Abington* v. *Schempp*, 374 U.S. 203, 226 (1963). Through "the crucible of litigation," *id.* at 4669, this Court has recognized that "it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard." *Id.*

To invade the citadel would be to collide with our historic commitment to treat religion specially. *See Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943). As Madison declared and this Court affirmed in *Engel* v. *Vitale*, 370 U.S. 421 (1962), it is because religion is "too personal, too sacred, too holy." 370 U.S. at 432.

Treating religion specially means treating sectarian institutions differently from all others. Since the underlying objective of the establishment clause is "to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other," *Aguilar* v. *Felton*, 53 U.S.L.W. at 5016, *citing Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971), *amici* submit that the state cannot pay for a minister's training.

The Washington Supreme Court's decision that "it is not the role of the state to pay for the education of future ministers" protects the church from intrusion by the state. *Witters* v. *State of Washington*, 689 P.2d 53, 56 (Wash. 1984). The Washington court recognized that this case does not pose the question of whether a state may properly direct aid to sectarian institutions for non-sectarian purposes, nor does it require a decision on the legality of aid generally to visually handicapped students. The specific issue in the instant case is whether a state can subsidize the training of a future pastor, missionary or church youth director by transferring taxpayers' money directly to his religious school. The purpose of this aid would be manifestly sectarian.

Once Larry Witters expressed a religious vocational preference, the first amendment, as applied to the states by the fourteenth amendment, *see Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), requires the state to treat his situation differently from all others. As the framers wisely saw and this Court has consistently recognized, government aid to religious institutions raises numerous problems which threaten individual religious liberty -- problems not raised by aid to secular institutions.[2] It is this special concern with religious liberty, *see Jaffree*, 53 U.S.L.W. at 4669, not triggered by aid to non-religion, which mandates eschewal of government aid to religious institutions.

There was no greater establishment concern for the framers than government aid for religious institutions, whether preferential or not, because they believed such aid would threaten individual religious liberty in numerous ways. They perceived danger in its potential for engendering competition among religions. *See Grand Rapids* v. *Ball*, 53 U.S.L.W. at 5008, *citing Committee for Public Education* v. *Nyquist*, 413 U.S. at 796-798; *Lemon* v. *Kurtzman*, 403 U.S. at 622-624. They also feared the coercion inherent in drawing upon compulsory tax payments for the support of sectarian institutions. *See, e.g., Everson* v. *Board of Education*, 330 U.S. 1, 13 (1947).

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2. This is glossed over by petitioner in this case and by the United States as *amicus*. While the argument that religious and non-religious institutions must be treated equally, *see* Brief for Petitioner at 20; Brief for the United States as *Amicus Curiae* at 15 n.6, is facially appealing, this argument fails to account for the special treatment historically accorded to religious institutions in order to protect individual religious liberty. *See Jaffree*, 53 U.S.L.W. at 4669.

The history of disestablishment in Virginia reflects the framers' opposition to a general tax to be distributed among all Christian Churches. Recognizing that the government would have to define a religious institution for purposes of government aid, the framers believed that such definitions would result in limits on religious liberty and exclude those of different or no religious beliefs. *See Grand Rapids,* 53 U.S.L.W. at 5008; *Everson* v. *Board of Education,* 330 U.S. 1, 13-16 (1947). Further, given that government is majoritarian, there is always the possibility that initial government support for a variety of religious establishments may later shrink to only some or one. *See* J. Madison, *Memorial and Remonstrance Against Religious Assessments,* Appendix to *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

These principles were recently reinvoked by this Court in *Grand Rapids,* 53 U.S.L.W. at 5008. In rejecting government aid to institutions devoted to religious instruction, the Court reaffirmed the wisdom of the framers.[3] It called for "an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Grand Rapids,* 53 U.S.L.W. at 5008, *quoting Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952).

Beyond the potential discrimination inherent in government aid to religious institutions is a coercion resulting from requiring all citizens -- regardless of belief -- to support religious institutions and advance their religious missions. Such coerced support for a religious institution's sectarian purpose constitutes a fundamental threat to individual religious liberty.

This was recognized by the framers in the Virginia Bill for Religious Liberty, *see Everson* v. *Board of Education,* 330 U.S. at 13, and reaffirmed by this Court: "No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever. . . ." *Id.* Furthermore, this Court has also emphasized

3. Madison's *Memorial and Remonstrance* was a response to a proposed bill in Virginia to tax for purposes of supporting teachers of religion. This proposed assessment was rejected, and instead the Virginia legislature passed the Bill for Religious Liberty, which served as the foundation for the First Amendment. *See Everson* v. *Board of Education,* 330 U.S. 1, 13 (1947).

that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *McCollum* v. *Board of Education,* 333 U.S. 203, 210 (1948).

The compulsion implicit in the use of tax monies to support religious institutions in their religious objectives conflicts with this Court's recent assertions that at the heart of the first amendment protection is "individual freedom of conscience" which "embraces the right to select any religious faith or none at all." *Jaffree,* 53 U.S.L.W. at 4669. Moreover, this right of selection must be the "product of free and voluntary choice" if it is to be a right at all. Where compulsory taxation would provide funding of a sectarian institution, this free choice is absent.

It is this individual religious liberty which is implicated in the instant case. *See infra* section II. For the state to provide aid to a religious institution, the Inland Empire School of the Bible, in order to train its future ministers, is to threaten the religious liberty of all citizens who do not share that institution's creed. The provision of such aid diverts government from its course of "complete neutrality" toward religion. *Jaffree,* 53 U.S.L.W. at 4671.

While some forms of government aid to religious institutions do not raise the concerns at issue in the instant case because they are incidental and do not advance religious purposes,[4] the funding at issue herein, more fully discussed *infra*, concededly subsidizes a religious institution's religious purpose.

4. Institutions may appropriately receive incidental government benefits particularly in areas where the government has a monopoly, such as fire and police protection. *See Abington* v. *Schempp,* 374 U.S. 203, 260 (1963) (Brennan, J., concurring).

B. State Aid Directed to the Inland Empire School of the Bible on Larry Witters' Behalf Would Have the Unconstitutional Primary Effect of Advancing Religion

For a statute to survive scrutiny under the establishment clause, this Court has held that (1) it must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion. *Jaffree*, 53 U.S.L.W. at 4670, *reaffirming Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). All of the parties to this action agree that the Washington statute implicated in the case has a valid secular legislative purpose, and no party posits a significant entanglement problem. Consequently, in the instant case, the statute's constitutionality under the tripartite test depends upon this Court's determination of its primary effect.

Amici submit that the primary effect of giving state aid to the Inland Empire School of the Bible to finance Larry Witters' religious training is to advance his religion. Such aid is unconstitutional, first because the institution is pervasively sectarian and would be using the aid for a sectarian purpose, and further because the aid would be transmitted directly from the state to the sectarian institution.

1. *A State Cannot Provide Aid to a Pervasively Sectarian Institution for a Sectarian Purpose*

a. *The Inland Empire School of the Bible, a Sectarian Institution, is an Improper Recipient of State Aid*

This Court has held that there may be no government aid to advance a sectarian purpose. *See, e.g., Grand Rapids* v. *Ball*, 53 U.S.L.W. at 5009. Accordingly, when secular and sectarian activities are separable, the Court has approved aid only to support secular activities. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 756 (1976); *see also Aguilar* v. *Felton*, 53 U.S.L.W. at 5016; *Committee for Public Education* v. *Nyquist*, 413 U.S. 756

(1973); *Hunt* v. *McNair*, 413 U.S. 663 (1973).[5] No government aid may be given to institutions so pervasively sectarian that secular activities cannot be separated from sectarian ones. *Roemer*, 426 U.S. at 756; *see also Hunt* v. *McNair*, 413 U.S. 663 (1973); *Tilton* v. *Richardson*, 403 U.S. 672 (1971). Most recently, the Court declared that aid to pervasively sectarian schools impermissibly advances religion when it constitutes a subsidy to the "primary religious mission" of the institutions affected. *Grand Rapids* v. *Ball*, 53 U.S.L.W. at 5009.

There is no dispute that the Inland Empire School of the Bible is a pervasively sectarian institution. That alone is sufficient to render the state aid in question unconstitutional. Moreover, even if the Inland Empire School of the Bible were found to have a secular side, it would make no difference as to the case at the bar. *Amici* submit there can be no question that funds used to train a future minister serve a non-secular purpose. Such funds constitute a subsidy for the school's primary religious mission, and must be found unconstitutional.

b. *While Inland Empire is a Recipient of Aid Also Available to Others, the Court Below was Correct in Determining the Sectarian Purpose Herein by Focusing Specifically on the Bible School*

Petitioner contends that the decision of the Washington Supreme Court should be overturned because when examined as a whole, the statute at issue has a legitimate primary effect. However, this Court has explicitly and unambiguously refused to support the notion that a "law found to have a 'primary' effect to promote some legitimate end . . . is immune from further examination to ascertain whether it also has the direct and immediate

5. In *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, where this Court disallowed a New York tuition reimbursement program which included direct state grants to parents who send their children to non-public schools, it emphasized that the state had made no endeavor to guarantee the separation between secular and religious educational functions and to ensure that state financial aid supports only the former. *Id.* at 783. Here, petitioner does not even contend that the aid he seeks would support a non-religious educational function of the school.

effect of advancing religion." *Nyquist*, 413 U.S. at 784 n. 39 (1973).

In one case after another involving state aid to private institutions of higher education, this Court has focused not on the merits of state programs as a whole, but rather on the eligibility of specific sectarian recipients. In *Roemer*, for example, the issue was whether four Catholic colleges in Maryland could receive state funds available to all private schools of higher education in that state. *Roemer*, 426 U.S. 736 (1976). In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), this Court focused specifically on four church-related colleges in Connecticut to determine their eligibility for federal grants also offered to many other schools. In *Hunt* v. *McNair*, 413 U.S. 663 (1973), the case relied upon by the Washington Supreme Court, this Court considered the eligibility of one Baptist-controlled college to benefit from the issuance of revenue bonds intended to support all private colleges in South Carolina. In each of these decisions, the Court recognized the secular nature and overall merit of the states' efforts to assist private colleges and universities. Nevertheless, as the *Hunt* Court emphasized, to identify primary effect it is necessary to narrow the Court's focus "from the statute as a whole to the only transaction presently before us." *Hunt*, 413 U.S. at 744. To do otherwise here would be to depart from establishment clause precedents which have served effectively to ensure the separation of church and state.

2. *A State Cannot Directly Transmit Aid to the Non-Secular Educational Function of a Sectarian Institution*

In *Grand Rapids* v. *Ball*, this Court stated that "direct aid to the educational function of [a] religious school is indistinguishable from the provision of a direct cash subsidy to [a] religious school that is most clearly prohibited under the Establishment Clause." *Grand Rapids*, 53 U.S.L.W. at 5012. *Witters* involves precisely such direct aid, because the Washington program at issue provides financial assistance to each school in which a visually handicapped student enrolls. Larry Witters would have the

state provide aid to the educational function of the Inland Empire School of the Bible on his behalf. The state correctly perceived that it could not legally do so.

When considering cases involving aid to sectarian institutions, this Court has frequently observed that the form which the aid takes is critical. *E.g.*, *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973). In this case, the United States as *amicus curiae* in support of the petitioner concedes that "recent decisions of this Court have found many forms of direct assistance to religious institutions, including schools, troublesome." Brief of the United States as *Amicus Curiae* at 9. However, petitioner and the *amici* supporting him have mischaracterized this case by failing to acknowledge that Washington's practice is to forward the funds in question directly to schools rather than to individuals. Brief for Petitioner at 23. In other words, the aid in this case would take the form of direct assistance to a religious school, and this is a distinction which makes a difference.[6]

Amici submit that attempts to analogize this case to Veterans Administration programs which provide aid to individual veterans and to programs of governmental assistance for students are misleading. The United States brief is accurate when it observes: "generally speaking, when benefits are provided to individuals, the government does not require that the individual use the aid for nonreligious purposes or in nonreligious settings. . . on the other hand, when aid is provided directly to institutional grantees, limitations are often placed on the aid to ensure that it is used for secular purposes and not diverted to religious ends." Brief of the United States as *Amicus Curiae* at 19-20. That brief errs, however, when it categorizes the Washington program as an example of aid to individuals. If Witters were granted the aid he seeks, it

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6. This Court has not been satisfied with avowed statements of purpose, occasionally perceiving them as "legal fictions." *See Grand Rapids* v. *Ball*, 53 U.S.L.W. at 5012 (1985); *see also Stone* v. *Graham*, 449 U.S. 39 (1980). Here, if there is any fiction involved, it is factual rather than legal. The Court should not be misled by petitioner's attempt to mask the nature of the aid.

would take the form of a State of Washington check made payable to and transmitted directly to the Inland Empire School of the Bible.

C. State Aid Directed to the Inland Empire School of the Bible on Larry Witters' Behalf Would Represent an Unconstitutional Endorsement of His Religion

This Court has recognized that "when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale*, 370 U.S. 421, 432 (1962). Government is consequently precluded from conveying or attempting to convey a message that a particular religious belief is preferred, because "such an endorsement infringes the religious liberty of the non-adherent." *Jaffree*, 53 U.S.L.W. at 4674 (O'Connor, J., concurring).

The Inland Empire School of the Bible trains pastors, missionaries and church youth directors -- religious professionals who often seek to proselytize and to impress their religious views on others who are uncommitted, including impressionable public school children. *See Young Life Youth Ministers' Activities Raise Policy Issues for Educators*, Education Week (October 28, 1983). For government to pay for the training of these religious ministers is unmistakably to convey "endorsement of a particular religious belief, to the detriment of those who do not share it." *Thornton* v. *Caldor*, 53 U.S.L.W. 4853, 4856 (U.S. June 26, 1985) (O'Connor, J., concurring). Such a message would be contrary to the very essence of the first amendment.

II.

THE WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND DID NOT VIOLATE LARRY WITTERS' FREE EXERCISE RIGHTS BY DENYING HIM FUNDING FOR HIS MINISTERIAL TRAINING

The free exercise clause of the first amendment generally comes into play when a central religious tenet is at stake and some form of government action or coercion burdens that tenet. *See Thomas* v. *Review Board*, 450 U.S. 707, 719 (1981). As this Court has recognized, "to condition the availability of benefits upon [one's] willingness to violate a cardinal principle of [one's] religious faith effectively penalizes the free exercise of . . . constitutional liberties." *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963).

Petitioner has never asserted that the state is requiring him to violate a cardinal principle of his faith. He could not make such an assertion, because the state has not compelled or coerced him to violate his religious beliefs. All the state has said is that it has no obligation to subsidize his ministerial training.[7] Larry Witters remains free to practice his religion and to pursue whatever career he chooses.[8] He simply has no free exercise right to have the government pay for him to become a pastor, a missionary or a church youth director.

Petitioner's discussion of the free exercise clause focuses on the fact that the state is treating him in a "disparate manner solely because he has chosen a religious career." Brief for Petitioner at 40. This "inequality" has nothing to do with free exercise, but rather is grounded in the special constitutional protection barring establishment of religion. *See supra* section IA. Contrary to Witters' contention that he "may not be disqualified solely

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7. In fact, the state has an affirmative responsibility under the Constitution not to fund his ministerial training. To do otherwise would be a violation of the establishment clause. *See supra* section I.

8. *Amici* recognize that the state's refusal to subsidize the petitioner's ministerial training may affect his career choice, but not all disincentives to religious practice amount to violations of constitutional rights. *E.g.*, *Thornton* v. *Caldor*, 53 U.S.L.W. 4853 (U.S. June 26, 1985).

because of his religious career choice," Brief for Petitioner at 45, *amici* submit that his religious career choice requires the state to treat him differently.

If free exercise rights are implicated in this case at all, it is the rights of Americans of faiths other than Witters -- or those who are not religious -- not to pay for his ministerial training with their tax dollars. As this Court has recognized:

> [T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical . . . even forcing him to support this or that teacher of his own persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern. . . .

Everson v. *Board of Education*, 330 U.S. 1, 13 (1947). The Solicitor General concedes it is for the Court to decide "when, or whether, an individual beneficiary's use of tax-supported governmental financial assistance may be restricted because of the religious implications of the expenditure." Brief of the United States as *Amicus Curiae* at 15, *Bender* v. *Williamsport*, No. 84-773 (distinguishing *Bender* from *Witters*).

The individual freedom of conscience protected by the first amendment "embraces the right to select any religious faith or none at all." *Jaffree*, 53 U.S.L.W. at 4669. Accordingly, *amici* submit the free exercise mandate stands for the proposition that one person's tax dollars should not support another's ministerial training.

III

THE WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND'S DECISION NOT TO SUBSIDIZE WITTERS' RELIGIOUS TRAINING IS MANDATED BY THE WASHINGTON STATE CONSTITUTION.

The foregoing portion of this argument assumes that the Court will reach the federal constitutional question raised in this case and affirm the Washington Supreme Court's decision. However,

in light of the independent separate state constitutional grounds which exist for the decision below, *Witters*, 689 P.2d at 55, this Court need not now undertake to review that decision at all.

In the absence of a free exercise right to funding in this case, no federal mandate exists to outweigh Washington's compelling interest in maintaining the strict separation of church and state required by the Washington State Constitution. The religion clauses of the state constitution require that no public funds be appropriated or applied to any religious worship, exercise or instruction, Wash. Const. art. I, § 11, and that no school under sectarian "control or influence" be supported wholly or in part by public funds, Wash. Const. art. IX, § 4. These provisions so clearly dispose of the instant case that the Washington Supreme Court found it unnecessary to discuss them in detail. Though that court's opinion discusses more extensively the federal question, its resulting decision rests on both independent state constitutional grounds and first amendment considerations. *Witters*, 689 P. 2d at 55.

This Court has traditionally declined jurisdiction when a state's highest court rests its decision on an independent and adequate state substantive ground. *Herb* v. *Pitcairn*, 324 U.S. 117 (1945). Most recently, the Court has limited this doctrine to those instances where the state court decision clearly articulates separate, adequate and independent state law grounds, *see Michigan* v. *Long*, 103 S.Ct. 3469, 3476 (1983), and where the state law determination is not dependent upon federal law. *See Ake* v. *Oklahoma*, 53 U.S.L.W. 4179, 4181 (U.S. Feb. 26, 1985). In the case herein, the state court opinion is a "plain statement" of the independent state and federal bases underlying the court's decision. *See Michigan* v. *Long*, 103 S.Ct. at 3476; *Witters*, 689 P.2d at 55.[9]

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9. Moreover, the Court has followed a policy of "strict necessity" in deciding whether to adjudicate federal constitutional issues when the record presents other grounds for disposing of the case. *F.C.C.* v. *Pacifica Foundation*, 438 U.S. 726, 734-735 (1978); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-569 (1947). "Like the case and controversy limitation itself and the policy against entertaining political questions, it [the policy of "strict necessity"] is one of the rules basic to

This Court should be particularly sensitive to a state's interpretation of its own constitution. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *State of Minnesota* v. *National Tea Company*, 309 U.S. 551, 557 (1940). *See also Sires* v. *Cole*, 314 F.2d 340 (9th Cir. 1963), *cert. denied*, 374 U.S. 847 (1963) (holding that the Washington Supreme Court's decisions construing provisions of the state constitution are binding upon the federal courts). When the state court opinion relies on similar provisions in both the state and federal constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving the Supreme Court of jurisdiction to review the state judgment. *See, e.g., Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965).

The provisions in the Washington Constitution concerning public aid to religious establishments are contained in Articles One and Nine. Article I, Section 11 provides:

> No public money or property shall be appropriated for, or applied to any religious worship, exercise or institution, or in support of any religious establishment.

Article IX, Section 4 provides:

> All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

The two administrative agencies and the Washington Superior Court all declined to allow Witters to use vocational funds for ministerial training because the state constitutional prohibition governing the use of public funds for religious instruction is absolute. *In re Larry Witters*, No. 0480A - 237 (Dept. of Social and Health Services, Office of Hearings, Oct. 23, 1980 and Dec. 30, 1980), *Witters* v. *State of Washington Commission for the Blind*,

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the federal system and this Court's appropriate place within that structure." *Rescue Army*, 331 U.S. at 570.

No. 80-2-04706-4 (Supr. Ct. of the State of Washington, Spokane County, Verbatim Report of Proceedings before Hon. Marcus M. Kelley, December 11, 1981).

In affirming the lower court decisions, the Washington Supreme Court recognized that Witters is prohibited under the state constitution from using his vocational funds for training as a minister. According to the Court:

> Since our state constitution requires a *far stricter* separation of church and state than the federal constitution (*see Weiss* v. *Bruno*, 82 Wash. 2d 199, 509 P. 2d 973 (1973)), it is unnecessary to address the constitutionality of the aid under our state constitution.

Witters, 689 P.2d 53, 55 (1984) (emphasis added).[10] Both *Witters* and *Bruno* stem from a line of precedents in which the Washington Supreme Court has required strict enforcement of the provisions of the religion clauses of the state's constitution.[11]

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10. In *Weiss* v. *Bruno*, the Washington Supreme Court struck down two legislative statutes as unconstitutional under the state constitution's religion clauses. One statute provided financial assistance to "needy and disadvantaged" students attending public or private schools; the other established a tuition supplement program to undergraduates attending independent or private institutions of higher learning. The court declared that "there is no such thing as a 'de minimis' violation of art. IX § 4." *Weiss* v. *Bruno*, 509 P. 2d 973, 978. The court's language echoes an earlier warning by Justice Clark that "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *See Abington School District* v. *Schempp*, 374 U.S. 203, 225 (1963). The prohibition against the use of public funds in payments to schools or students attending schools or universities under sectarian "control or influence" is absolute. *Weiss*, 509 P. 2d at 978. It is constitutionally irrelevant that the public funding is minimal, affects both public and private school students alike, and is transferred to the student rather than to the school or college. *Id.* at 978-981. "Any use of public funds that benefits schools under sectarian control or influence -- regardless of whether that benefit is characterized as 'indirect' or 'incidental,' " is a violation of art. IX § 4. The provision permits no exceptions. *Id.* at 981.

11. *See, e.g., Visser* v. *Nooksack Valley School District*, 33 Wash. 2d 699, 207 P. 2d 198 (1949). In *Visser*, the Washington Supreme Court declined to allow schoolchildren attending religious and sectarian schools to use buses provided by the school district for transportation of public school students to and from school. Though this Court has given states the option of permitting such transportation, *see Everson* v. *Board*

Consequently, in accordance with the mandate of the Washington Constitution as interpreted by the state's highest court, the Washington Department of Services for the Blind was obligated to deny funding for Larry Witters' religious training. The seven-judge Washington Supreme Court majority affirmed the Department's holding on the state constitution. By invoking *Weiss* v. *Bruno* as a dispositive precedent, *see Witters*, 689 P. 2d at 55, the majority avoided a repetition of the very detailed analysis of the state constitution's religion clauses contained in *Weiss*, but nevertheless made clear that an independent and adequate state ground existed to dispose of the case. *See Michigan* v. *Long*, 103 S.Ct. at 3476. Therefore, this Court should not review the state judgment.

of Education, 330 U.S. 1 (1947), the Washington Supreme Court adopted a stricter standard so as to avoid violating the state constitution. *Visser*, 207 P. 2d at 204-205.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be affirmed.

Dated: August 2, 1985

Respectfully submitted,

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OFFICE OF THE ATTORNEY GENERAL

May 16, 1985

Mr. Steve Freeman
Legal Assistance Department
Anti-Defamation League
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New York, NY 100017

Dear Steve:

In our telephone conversation a few days ago you asked whether or not there was a written policy or rule which existed concerning the payment of vocational rehabilitation funds. I have checked with the Department of Services for the Blind. They have indicated to me that there is no written policy or a rule that has promulgated indicating how payment would be made for persons eligible for the vocational rehabilitation services. However, the practice has always been to pay the school or training facility directly. This has gone on since the beginnings of the program. No one has been able to remember a time when the money was given directly to the individual.

The reason for this is to make sure that the individual does not take the money and spend it on something else. Further, if the individual withdrew from school for any reason, the state could receive a refund from the institution involved. There are other reasons too, but I will not reiterate them all.

Therefore, in response to your request, I make the following statement. Washington State's practice is to provide the money directly to the institution involved and not to the individual. This is not an entitlement program such as the educational program of the Veteran's Administration. In the latter situation, the money was sent directly to the veteran.

I am also enclosing a copy of Article 1, Section 11, and Article 9, Section 4, of the Washington State Constitution. These sections form the basis of the Department of Services for the Blind's refusal to fund Mr. Witter's career choice. Further, I am enclosing copies of RCW 74.18.020(4) and 74.18.130 through 180, which are the current statutes governing the vocational

rehabilition program that Mr. Witters would be receiving services from. I also enclose copies of the former statute under which Mr. Witters applied for services which are RCW 74.16.181, 183 and 300. The latter statutes have been repealed with the adoption of chapter 74.18 Revised Code of Washington.

I trust this will be of assistance to you.

Yours truly,

DAVID R. MINIKEL
Assistant Attorney General

DRM:sj

Enclosures